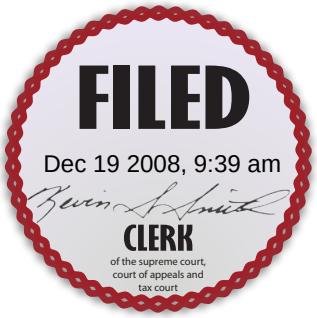

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IN THE
COURT OF APPEALS OF INDIANA

DANNY L. RICHARDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 42A01-0712-CR-585
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-0602-FB-14

December 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Danny Richards appeals the sentence imposed following his plea of guilty to dealing in a schedule II controlled substance, a Class B felony. On appeal, Richards raises a single issue, which we restate as whether the trial court erred when it sentenced Richards to a term of twenty years, the maximum for a Class B felony. Concluding that Richards entered into a written plea agreement including an agreed-upon fixed sentence and that the trial court sentenced him in accordance with that agreement, we affirm.

Facts and Procedural History

On February 15, 2006, the State charged Richards with count I, dealing in a schedule II controlled substance, a Class B felony, and count II, maintaining a common nuisance, a Class D felony. On October 26, 2007, the parties filed a written plea agreement ("the agreement") in which Richards agreed to plead guilty to count I in return for the State agreeing to dismiss count II as well as five counts of child molesting, three as Class A Felonies and two as Class B felonies, pending in the same trial court under a separate cause number.[1] The agreement also states the State "will recommend to the [trial court] that the Defendant receive the following penalty . . . Twenty (20) years of incarceration with Five (5) years suspended to formal probation, and Fifteen (15) years to be executed." Appellant's Appendix at 139.

The trial court held a change of plea hearing on October 26, 2007. At the hearing, the trial court described the agreement in pertinent part as follows:

> The parties' agreement provides that the Defendant will enter a plea of guilty today to Dealing in a Schedule II Controlled Substance, a Class B

[1] Richards's first trial on the child molesting charges ended in a mistrial, and the State was apparently preparing to retry the charges at the time of the plea agreement.

> felony. The parties have agreed that the Defendant will receive a sentence of 20 years of incarceration in the Indiana Department of Correction with five of those years suspended to formal probation and 15 years executed.

Transcript at 81-82. The trial court asked Richards's counsel, "is that a fair rendition of your agreement?", and he replied, "Yes, that is, Your Honor." Id. at 84.

At the plea acceptance and sentencing hearing, the State expressed some concern about whether Richards accepted the terms of the agreement. The trial court said to Richards, "my understanding is this morning you had some questions in your mind about this Plea Agreement?" Id. at 104-05. Richards responded in the affirmative. The trial court then asked, "Do you still wish to go forward with this Plea Agreement today? … You've thought about it? … [Your attorney] has explained to you the various alternatives either way, right? … And you wish to go forward with this as it's written?" Id. at 105. Richards responded in the affirmative to each question. After accepting the guilty plea, the trial court stated, "the Court agrees to be bound to sentences [sic] provided by [the plea agreement's] terms" and "the Court will now proceed with sentencing of Mr. Richards pursuant to the terms of the Plea Agreement." Id. at 107, 08. The trial court then made the following sentencing statement:

> Okay, in sentencing any Defendant for a felony, the Court has to consider certain statutory factors and the Court has considered these factors in determining that it would accept this Plea Agreement. Because I've accepted this Plea Agreement as it's written and agreed to be bound by it, the Court finds neither aggravating nor mitigating factors against Danny Richards. The Court now sentences the Defendant, Danny L. Richards, as follows, on this Dealing charge in Cause Number FB-014. Pursuant to the parties' Agreement, the Defendant shall receive a sentence of 20 years in the Indiana Department of Correction with five of those 20 years suspended to formal probation and 15 years executed . . . ."

Id. at 109. At the conclusion of the hearing, the trial court asked Richards if he had any questions about his obligations and he responded in the negative.

Discussion and Decision

I. Standard of Review

We review a trial court's sentencing decision for an abuse of discretion, which occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence "is inappropriate in light of the nature of the offense and the character of the offender." Id.

When a plea agreement leaves the issue of sentencing solely to the trial court, provides a sentencing range, or provides a cap on sentencing, the trial court exercises discretion in determining the specific number of years to be sentenced. See Childress v. State, 848 N.E.2d 1073, 1078 (Ind. 2006). In such cases, a defendant "is entitled to contest the merits of a trial court's sentencing decision." Id. at 1078-79 (quoting Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996)). However, when a plea agreement calls for a specific number of years, the trial court, if it accepts the agreement, has no discretion to impose any sentence other than the precise sentence on which the parties agreed. Id. at 1078 n.4 (citing Badger v. State, 637 N.E.2d 800, 802 (Ind. 1994) ("[I]f the court accepts the agreement, it becomes bound by the terms of the agreement.")). A so called "fixed"

plea agreement is not subject to Indiana Appellate Rule 7(B) review. See Hole v. State, 851 N.E.2d 302, 304 (Ind. 2006).

II. Review of the Sentence

A. Fixed or Open Plea Agreement

The threshold question is whether Richards entered into a fixed or open plea agreement. A plea agreement is "an agreement between a prosecuting attorney and a defendant concerning the disposition of a felony … charge." Ind. Code § 35-35-3-1. As this court has previously stated:

> Plea agreements are contracts[,] which are entered into between the State and defendant and are binding upon both parties when accepted by the trial court. Once a trial court accepts a plea agreement, it is bound by its terms. The principles of contract law provide guidance in the consideration of plea agreements. In interpreting a contract, our primary goal is to give effect to the parties' intent. When the terms of a contract are clear and unambiguous, they are conclusive of that intent, and we will not construe the contract or look to extrinsic evidence. Ambiguity is found in the terms of the contract only if reasonable people would find the contract subject to more than one interpretation, not merely because a controversy exists between the parties concerning proper interpretation.

Baker v. State, 768 N.E.2d 477, 481 (Ind. Ct. App. 2002) (citations omitted).

Here, the language at issue in the agreement reads, "The State of Indiana will recommend to the Court that the Defendant receive … Twenty (20) years of incarceration with Five (5) years suspended to formal probation, and Fifteen (15) years to be executed." Appellant's App. at 139. The State contends the agreement creates a fixed sentence; whereas, Richards contends it merely recommends a sentence and otherwise leaves sentencing to the trial court's discretion. The issue of whether use of the word "recommend" creates an open or fixed plea agreement is currently before our supreme

court. See St. Clair v. State, 880 N.E.2d 1213 (Ind. Ct. App. 2008), trans. granted, 891 N.E.2d 46 (Ind. 2008) (oral argument held on August 14, 2008). However, we do not find the meaning of the word "recommend" dispositive in this case because the conduct of the parties clearly evidences the intended meaning of the plea agreement.[2]

When a plea agreement is ambiguous, that is when reasonable people would find it subject to more than one interpretation, this court may consider extrinsic evidence to determine the intent of the parties. See Baker, 768 N.E.2d at 481. Here, the agreement uses the term "recommend," which could indicate it merely suggests a sentence to the trial court. On the other hand, the agreement could indicate an agreed upon fixed sentence as it sets forth a specific, detailed sentence, without any discretionary language or indication that twenty years should be viewed as a sentencing cap. Thus, the text of the agreement is subject to more than one interpretation. Looking, however, at the conduct of the parties and the trial court, it is clear that the parties intended, and the trial court understood, the agreement to include a fixed sentence.

The trial court repeatedly stated its understanding that the parties had agreed to a fixed sentence and referred to itself as being bound by the sentence given in the agreement. The trial court specifically questioned Richards's counsel whether its understanding of the agreement was accurate and counsel responded affirmatively. The

[2] We acknowledge the motions panel of this court has already determined the parties did not agree on an exact sentence but rather the prosecutor promised to recommend a certain sentence to the trial court. However, even though the motions panel of this court has already ruled on the issue, we may reconsider that ruling. State v. Moore, 796 N.E.2d 764, 766 (Ind. Ct. App. 2003), trans. denied. After full consideration of the record before us, we conclude that, despite the use of the word "recommend" in the written agreement, the conduct of the parties and the trial court at the change of plea and sentencing hearings implies that the parties did agree on a fixed sentence.

trial court also specifically questioned Richards about his understanding of the terms of the agreement and whether he wished to proceed with the agreement.

At sentencing, the trial court indicated that it "will now proceed with sentencing of Mr. Richards pursuant to the terms of the Plea Agreement." Tr. at 108 (emphasis added). In its sentencing statement, the trial court indicated that it accepted the agreement "as it's written" and "agreed to be bound by it." Id. at 109. The trial court further commented that because it was bound by the agreement, it found no aggravating or mitigating circumstances. The trial court then proceeded to sentence Richards "[p]ursuant to the parties' Agreement." Id. Richards never objected to this characterization of the agreement or made any attempt to correct the trial court's understanding despite the trial court taking numerous steps to confirm a proper understanding of the agreement. In addition, neither party made any attempt to argue for a sentence other than that specified in the agreement. Although the trial court ordered a pre-sentencing investigation report, it made no reference to the findings of the report at the sentencing hearing as justification for its sentence. Therefore, the conduct of the parties and the trial court at the change of plea and sentencing hearings makes clear that everyone involved understood the agreement to include a fixed sentence that the trial court would be obliged to impose should it accept the agreement. In light of this, Richards received the sentence for which he bargained and to which he agreed. Therefore, the trial court did not err in sentencing Richards in accordance with the agreement, and we will not review the sentence pursuant to Indiana Appellate Rule 7(B). See Hole, 851 N.E.2d at 304.

B. Sentencing Statement

Richards next argues that the trial court erred by issuing a defective sentencing statement. When a trial court imposes a sentence for a felony offense, it must issue a statement of its reasons for selecting the sentence it imposes. Ind. Code § 35-38-1-1.3; Anglemyer, 868 N.E.2d at 490. "[T]he statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." Anglemyer, 868 N.E.2d at 490. If the trial court finds "aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Anglemyer, 868 N.E.2d at 490; see also, Ind. Code § 35-38-1-3.

Richards asserts that the trial court did not provide its rationale for imposing the maximum sentence. On the contrary, the trial court gave a detailed sentencing statement indicating that in accepting the agreement, it agreed to be bound by the agreement's sentencing terms. The trial court indicated that because the agreement fixed the terms of the sentence, it found neither aggravating nor mitigating factors. The trial court then made clear that it was sentencing Richards "[p]ursuant to the parties' Agreement." Tr. at 109. Therefore, the trial court gave a reasonably detailed recitation of its reasons for imposing the sentence and its sentencing statement is not defective.

Conclusion

Richards and the State entered into a written plea agreement, which included an agreed-upon fixed sentence, and the trial court imposed that sentence. In addition, the trial court issued a sufficient sentencing statement. Therefore, the trial court did not err

when it sentenced Richards to twenty years in accordance with the terms of his plea agreement.

Affirmed.

NAJAM, J., and MAY, J., concur.